

## The Constitution and the rule of law: some recent developments in Jamaica

Stephen Vasciannie\*

*Principal of the Norman Manley Law School and Member of the UN International Law Commission*

This article provides an analysis of some recent developments relating to Constitutional law in Jamaica, including the legal issues arising from tied elections and the dual nationality of parliamentarians. It also discusses a case relating to the failure to incorporate the United Nations Convention on Transnational Organized Crime (the Palermo Convention). In this case, though the Palermo Convention contemplates investigations by agents of one country on the territory of another for certain crimes, one state party found it was unable to carry out such investigations on the territory of another. Although the latter country, a CARICOM member state, was also a party to the Convention, it had not enacted the required implementing legislation

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### Introduction

The Jamaican Constitution, like all viable constitutions, operates at the border between law and politics. As part of the Westminster system, the Jamaican Constitution makes provisions essentially with respect to two broad issues: in the first place, the Constitution sets out the structure of government, and secondly, it provides a listing of fundamental human rights – or to be more precise, civil and political rights – to which all persons in Jamaica are said to be entitled.

These two features of the Jamaican Constitution are designed in large part to ensure that the Government, as a collective entity representing the will of the people, shows due regard for the rule of law. So, for example, starting from the premise that the rule of law connotes the idea that the Government and its functionaries must themselves be subject to legal constraints and must conform to decisions of the courts, it is evident that the rules in the Constitution concerning the structure of government are designed to provide the State with specific rules and strictures that must be fulfilled if the Government wishes to respect the rule of law. Similarly, the rule of law also suggests that in its interaction with individuals, the Government must show respect for the basic principles that form the core of the society's values: if a government acts in willful violation of the fundamental rights

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\*Email: [svasciannie@kasnet.com](mailto:svasciannie@kasnet.com)

and freedoms of its citizenry, that government is violating the idea of the rule of law.

On the safe assumption, therefore, that the rule of law is inherent in the structure of the Jamaican Constitution, this paper examines a number of constitutional issues that have recently arisen in the Jamaican polity. These include some matters that pertain to the structure and organization of government, such as the question of tied elections and the vexed matter of dual nationality. They also include matters pertaining to fundamental rights and freedoms, including the question of the long overdue Charter of Rights, and the relationship between Jamaican and International Law, particularly in the context of human rights. These issues are well known to Caribbean lawyers, and will not be canvassed with a view to providing definitive answers; rather, the purpose of the exercise will be to demonstrate some of the ways in which the issues prompt rule of law concerns. Generally, therefore, with respect to each of these issues, the question for consideration will be: what are the guiding principles that should influence a government committed to the rule of law?

### **Tied elections**

No general election in Jamaica has resulted in a tied vote, in terms of the number of seats won by two of the contesting parties. In 2007, there was a moment, as the seat counting progressed, when a tied vote of 30–30 appeared to be as likely a result as any other. And, prior to that moment, Dr. Lloyd Barnett and others had publicly noted that a tied result would have created a serious conundrum for the society. But what does the Jamaican Constitution actually say about a tied election result, and what may the idea of the rule of law require it to say?

As to the first question, the Jamaican Constitution offers only limited guidance. There is no express provision on what should happen in the event of a tie, but the terms of Section 70(1) of the Constitution suggest the approach that should be taken. Specifically, Section 70(1), which deals with the appointment of the Prime Minister reads in the relevant part:

Whenever the Governor-General has occasion to appoint a Prime Minister he, acting in his discretion, shall appoint the member of the House of Representatives who, in his judgment, is best able to command the confidence of a majority of the members of that House

When the Prime Minister is so appointed, he or she then advises on the appointment of Ministers, and on the appointment of 13 government senators. At the same time, by virtue of Section 80(1) the Governor-General is mandated to select a leader of the Opposition from among the members of the House who do not support the Government; upon this selection, the Leader of the Opposition is empowered to appoint Opposition Senators. In this way, the Constitution ensures the selection of the Cabinet and the Senate.

Applied to the case of a tied election, Section 70(1) places a significant, and difficult, burden on the Governor-General to select the Prime Minister. The Governor-General's mandate is worded in broad terms: it is expressly stated to be discretionary, it is a selection 'in his judgment', and it requires the Governor-General to make a subjective assessment as to the member of the House who commands the 'confidence' of the majority, with confidence itself being a

somewhat open concept. Where there is a clear majority in the House for one party, it is expected that the Governor-General will select as Prime Minister the leader of the winning party (as long as the leader is a member of the House); or, theoretically, the Governor-General could seek to ascertain from the winning side in the House the name of the person who commands their confidence. In practice, however, if the majority of the members of the winning side in the House were to select someone other than the leader of the party, this would undoubtedly prompt upheaval within the winning party. The expectation, therefore, that the leader of the winning party will be the Prime Minister is based on a fairly sure foundation.

With no rule for a tied election, the Governor-General will be obliged to select the Prime Minister with no clear guidance. In the case of Trinidad and Tobago, when the President was called upon to select a Prime Minister in the face of a tied election, he drew guidance from 'moral and spiritual factors' before reaching his decision – an approach that was vulnerable to the criticism that the President had acted in an arbitrary manner.

What then should a Governor-General in Jamaica do if he wishes to respect the rule of law? There is no clear answer to this question, but at least three possibilities may be mentioned. To begin with, the Governor-General may consider incumbency as a factor. The argument would be that an incumbent Prime Minister should remain in power after a 30–30 tie, because no new Prime Minister has been elected in clear terms. This argument is not convincing, for it is based on circular reasoning to the effect that the incumbent should remain in the position of Prime Minister because the incumbent is the Prime Minister. Indeed, one could argue just as easily – but with an equal lack of cogency – that the incumbent Prime Minister should be required to give up the mantle in the event of a tie because the incumbent has failed to regain his or her position in clear terms. In the context of a tied election, there seems to be no magic in incumbency.

A second possibility would be for the Governor-General to examine the geographical distribution of seats between the two tied parties. The purpose of this examination would be for the Governor-General to assess whether or not, on the basis of the spread of seats, it could be said that one of the tied parties has a more representative base across the country than the other party. On this line of reasoning, if, for example, one party captured seats in all parishes, but the other won its seats mainly on the basis of a concentration of victories in, say, one county, or in only a limited number of parishes, then the party with the greater parish spread should be declared the winner. This possibility is no more convincing than the argument based on incumbency. In practical terms, it is highly unlikely that one party would take seats in every parish while the other would have a high concentration of seats in only one or two parishes: thus, the approach would have little value as a method of assessment.

Moreover, even if one could develop an appropriate method of identifying the political party which had greater support across the country, this approach would be widely perceived as arbitrary. The Governor-General would be hard pressed to explain to the electorate in the highly charged atmosphere of a tied election why a vote in one parish has been given greater value than a vote in another parish for the purposes of deciding the victorious political party.

A third possibility would be for the Governor-General, in the context of a tie in the number of seats, to select the Prime Minister from the party that captures the

majority of the popular vote. This approach has the advantage of apparent objectivity: the party that wins the popular vote will always be in a position to argue that, in keeping with one quintessentially measurable criterion, it is ahead of the other party. This approach, however, is not without its difficulties.

One feature of the first-past-the-post system, as applied in the Westminster model, is that technically it is possible for the winning party in a general election to fall short of a majority of the popular vote. Indeed, this happened in Jamaica in 1949 when the Jamaica Labour Party won 19 of the 32 contested seats to form the Government, while the People's National Party held a 0.8% majority in the popular vote. So, the counter-argument against relying on the popular vote would be that the first-past-the-post system does not normally treat the popular vote as determinative in election matters. This counter-argument is correct with respect to situations in which the seat count in the general election provides an indisputable winner. But where there is a 30-all tie, then, *ex hypothesi*, there is no clear winner. It is suggested that in this limited and unusual situation, the Governor-General could give significant weighting to the popular vote in his identification of the person who is best able to command the confidence of the majority of the members of the House.

## Dual nationality of parliamentarians

### General

Issues concerning the nationality of parliamentarians, and in particular the question of dual nationality, have assumed prominence in Jamaica since the September 2007 General Election. In sum, it has been demonstrated to the point of legal certainty that on the date of the election one candidate held Jamaican nationality together with the nationality of a foreign State; it is further alleged that other candidates, not confined to one party, may have dual nationality.

This situation has created challenges for the rule of law. The Jamaican Constitution, in keeping with the approach taken in a number of other Commonwealth jurisdictions, frowns on dual nationality for members of parliament. Thus, Section 40(2) states that:

No person shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives who –

- (a) is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or State.

In her judgment in the case of *Abraham Dabdoub v Daryl Vaz*,<sup>1</sup> McCalla CJ exhibited patience in her review of arguments concerning the interpretation of this provision, but eventually concluded both that 'these words are clear'<sup>2</sup> and that 'similar provisions in Commonwealth Jurisdictions have been considered and interpreted without the need to resort to conventions and other interpretive aids'.<sup>3</sup> The rule of law challenges that arise in the present context do not, therefore, pertain

<sup>1</sup>Supreme Court Civil Division Claim No 2007 HCV 03921.

<sup>2</sup>Ibid at 35.

<sup>3</sup>Ibid.

to the meaning of the dual nationality provision in Section 40(2). Rather, they are concerned primarily with the implications of the rule in Section 40(2) and with the policy perspective implicit in the rule.

### *Implications*

If a person, by their own act, places him/herself under any acknowledgement of allegiance, obedience or adherence to a foreign power, that person shall not be eligible for membership of the Jamaican Parliament. And, for the purposes of this rule, *Dabdoub v Vaz* confirms that the voluntary application for a foreign passport, renewing that passport and traveling on that passport are actions that amount to an acknowledgement of allegiance, obedience or adherence to a foreign power. But what are the implications of this rule? Or, more specifically, what happens when a member of parliament was in breach of the dual nationality rule in Section 40(2) at the time of their nomination or election?

On this question, two mutually exclusive answers suggested themselves in *Dabdoub v Vaz*, namely,

- (i) that, if the winning candidate in the polls was ineligible on dual nationality grounds, then there should be a by-election involving eligible candidates; and
- (ii) that, in this situation, the candidate who placed second in the electoral contest should become the member of parliament.

In her judgment, the Chief Justice adopted the approach summarized as item (i) above, essentially on the grounds that the voters who elected the winning (but ineligible) candidate ought not to be presumed to have thrown away their votes. As a matter of law, this approach draws support from the line of cases including, among others, *Drinkwater v Deakin*,<sup>4</sup> *Peiris v Perera*,<sup>5</sup> and *Stephen Mattison v John Junor*.<sup>6</sup> However, the idea that voters do not deliberately throw away their votes is only a presumption, so that if it can be demonstrated that, at the material time, the voters had knowledge of the disqualifying condition and nonetheless supported the ineligible candidate, then the candidate with the second highest number of votes could prevail, without the need for a by-election. On the facts in *Dabdoub v Vaz*, the Chief Justice found that the votes supporting the winning, but ineligible, candidate, Mr Vaz, did not have clear, definite and certain knowledge of Vaz's ineligibility, and consequently, could not be deemed to have thrown away their votes. In reaching this conclusion, the Chief Justice attached considerable significance to the fact that the Director of Elections had, on two occasions, indicated that all candidates in the general election were properly nominated.

Overall, the approach taken by the Chief Justice on the implications of the breach in Section 40(2) is consistent with the requirements of the rule of law. First,

<sup>4</sup>(1874) 9 LRCP 626.

<sup>5</sup>(1969) 72 New Law Reports of Ceylon 232.

<sup>6</sup>(1977) 15 JLR 194.

inasmuch as the approach is supported by relevant legal authority, it cannot be criticized as being contrary to the reasonable expectations of candidates and voters. Second, in a majoritarian voting system, there is virtue in attaching a premium to the will of the people, as reflected in the popular vote. This forms the basis of the presumption that votes are not deemed to be thrown away unless voters deliberately choose to do so. Third, on the assumption that the rule of law seeks to promote clarity, the Chief Justice's willingness to rely on public statements from the Director of Elections has much to recommend it. Consider the alternative: Candidate A, as an election ploy to discourage voters from supporting Candidate B, publicizes the idea that rival Candidate B is an unqualified dual national. If the system does not allow the intervention of an unbiased third party (such as the Director of Elections), then Candidate A's chicanery could be unfairly rewarded. The system must have a way of discouraging unfounded claims. The current way, a compromise solution, is to suggest that where the Director of Elections intervenes in defense of Candidate B, a by-election will take place if Candidate B is, in fact, ineligible.

Admittedly, however, there are rule of law arguments that would support giving victory to the second-placed (and eligible) contestant without the need for a by-election. As a matter of logic, if two candidates enter a race, but one, by his own act, is not qualified, then the second candidate has a claim to victory – for the bid by the ineligible candidate was a nullity. No fault rests with the second candidate who, by definition, has played by the rules. Not only that, the by-election approach is unfair insofar as it gives the ineligible candidate the opportunity to remove his impediment in order to have another attempt at the prize, while it places the burden of by-election expenses on a candidate who has done no wrong. In short, the prevailing approach from *Dabdoub v Vaz* is vulnerable to the criticism that it appears to reward ineligibility and to penalize virtue. In addition, a skeptical advocate could probably argue that the line of authority supporting the conclusion in *Dabdoub v Vaz* on the need for a by-election is not entirely compelling. The Jamaican Constitution itself is silent on what should happen if an ineligible candidate is elected and, arguably, the cases on which reliance has been placed are either not fully on point, or do not constitute modern decisions of the highest authority.

### **Policy**

The rule of law requires the Executive and Legislature to accept and implement final decisions made by the Courts. Consistent with this basic principle, therefore, the Jamaican authorities have not demurred in giving effect to the Chief Justice's decision in *Dabdoub v Vaz*. At the same time, the decision has become an important element in the debate concerning whether Jamaica should amend its constitutional provisions on dual nationality. In fact, the Chief Justice herself remarked in *Dabdoub v Vaz* that parliament has the option to repeal or amend Section 40(2)(a) 'if it sees fit', but her duty was to apply the law as it is – an important rule of law distinction.

From a policy perspective, the dual nationality rule in Section 40(2)(a) can be defended on rational grounds. It is based on the assumption that the State has the power to determine its own criteria for nationality, and to delineate the rights

associated with citizenship. Thus, the State may opt, as a matter of national law, to give legitimacy to the view that members of parliament should not have divided loyalties. Similarly, the State may reasonably wish to discourage either the appearance or the reality of national conflicts of interest among its parliamentarians, and may opt to do so by barring dual nationality for this group of persons. This approach is not necessarily based on the so-called nervous nationalism associated with some postcolonial societies. On the contrary, the home State may justifiably support the proposition that its legislators should be prepared to demonstrate their willingness to live at home with the consequences of their legislative acts.

Of course, this perspective has been challenged. Some have suggested, for example, that in the era of globalization it is incongruous to deny individuals the opportunity to serve as representatives in the Jamaican Parliament while having foreign nationality (by their own act). It is also argued that Jamaicans have always been migratory, and that we rely heavily on the Jamaican diaspora for economic sustenance: *ergo*, we should allow dual nationals to serve in our parliament. The mere invocation of the fashionable term globalization in the current context is largely meaningless; globalization carries a wide variety of different policy implications, so the argument has to be given greater specificity before it can be properly assessed. There is some force in the idea that Jamaica, as a small, economically weak society, dependent on the diaspora could permit representation by dual nationals as a way of acknowledging our domestic realities and international connections. That debate will need to be resolved through democratic discourse on the meaning and significance of Jamaican citizenship.

As the debate continues, it may be useful to bear in mind that, even if the rule in Section 40(2)(a) is not abandoned, the current law associated with dual nationality may be improved. Specifically, Section 40(2) could be redrafted to indicate precisely what should happen if a candidate ineligible on nationality grounds is elected to the House. This would obviate the need to rely on case law points that remain open to argument. Also, in the interest of clarity, the law could be amended to require candidates to indicate in writing at the time of nomination whether or not they hold foreign nationality at the time of nomination (by their own act or otherwise). This approach, which borrows heavily from Trinidad and Tobago, would discourage fraud.

Finally, some thought should be given to the constitutional rules that apply to Commonwealth citizenship. Section 39 of the Constitution evinces the intention that Commonwealth citizens are eligible to become members of parliament, but this rule is expressly made 'subject to the provisions of Section 40'. And Section 40, in paragraph 2(a), prohibits persons who are foreign nationals by their own act from membership of parliament, in terms that apply to Commonwealth and non-Commonwealth citizens alike. The upshot is that non-Jamaican Commonwealth citizens, and Jamaican dual nationals with Commonwealth citizenship of a foreign country, are excluded from parliament if their allegiance to the foreign country is by their own act. This rule needs to be expressed in more precise terms. In addition, parliament should consider whether it still wishes to continue allowing non-Jamaicans who derive Commonwealth citizenship by birth in a foreign country to be eligible to become members of parliament. Some critics justifiably believe that it is odd to exclude certain Jamaican dual nationals from parliament at the very time

that we allow foreign-born Commonwealth citizens to become members of parliament after a period of residence in Jamaica.

### **Aspects of the Charter of Rights**

From the decade of the 1990s, various parliamentary and extra-parliamentary committees have concerned themselves amending the Jamaican Constitution. One area in which both major parties appear to share common ground concerns the Charter of Rights. The Charter of Rights is intended to replace the current provisions on fundamental rights and freedoms in the Constitution; and as such, it represents a significant attempt to give modern form and orientation to human rights in Jamaica.

Given that the rule of law, in its substantive form, is concerned with ensuring that the law incorporates fairness and rationality, some aspects of the Charter of Rights promise improvements in the rule of law. So, for example, the Charter of Rights, if passed in its most current form, would increase the number of rights available to persons in Jamaica, and reduce the range of exceptions to human rights protection that may be invoked by the State. Merely to increase the number of rights available would not necessarily result in improvements in the rule of law; however, if the rights in question lead to a greater degree of harmony between the State and individuals in society, it could prompt improvements in the way some individuals view the law and thereby facilitate the rule of law. Moreover, by abolishing the savings clause approach for colonial laws, the Charter of Rights would open the way for an expansion in the judicial assessment of a wide range of human rights issues. Jamaica's approach to whipping and flogging for some convicts has consistently been criticized by the United Nations Human Rights Committee. The country's only significant defense – that flogging and whipping are justified by pre-independence laws and therefore saved from human rights scrutiny by judges – is now wearing thin. If the savings clause goes, domestic judges will be able to consider from first principles several important human rights issues, in light of evolving standards of justice and domestic circumstances. The Charter of Rights would also formally change Jamaican constitutional law in a manner that would guarantee non-discrimination on grounds of sex.

And yet, despite the benefits that should accrue from the Charter of Rights, the relevant legislation has not been put to parliament for a vote. What factors explain the State's failure to introduce this progressive initiative?

The dominant explanation is the absence of political will. For a variety of historical and legal reasons, the Jamaican electorate has tended to attach relatively little importance to the structure and formal requirements of the Constitution, and by extension, issues pertaining to constitutional reform have not been pursued by the electorate as items of priority. This is so even though, as in the case of police killings, there may be pressure for improvements in the behaviour of agents of the State. Generally, the Constitution, and the rights guaranteed thereunder are widely perceived as quite far removed from the daily experience of the vast majority of persons in the society. Given, then, limited pressure from the populace, the pace of change towards the Charter of Rights has been decidedly unimpressive.

Other factors have also been at work. Arguably, there have been issues of proprietorship, with each of the major parties apparently wishing to bring the draft



Charter to parliament under its watch. It may also be that the Charter is yet to be introduced partly because there is no real consensus on how certain human rights issues are to be addressed: this appears to be true with respect to privacy rights, abortion, and increasingly so for the death penalty. In the circumstances, some human rights activists may be prepared to await a more opportune time to promote particular initiatives under the rubric of the Charter. Moreover, in fairness to the State, it should be recalled that there has been no shortage of constitutional reform issues for the State, quite apart from the Charter of Rights. Almost at random, one can identify the question of the fixed election date, the powers of the Public Service Commission, the validity of current libel laws, the scope of the separation of powers doctrine, and the reach of prime ministerial authority, as constitutional matters that have recently commanded State attention; these may have diverted attention from the Charter of Rights.

Finally, the main opposition party has recently indicated that it will not support passage of the Charter of Rights bill unless it is linked to legislation concerning the appellate jurisdiction of the Caribbean Court of Justice (the CCJ). At first blush, this may seem to be simply another argument to delay the Charter of Rights bill – marriage to the CCJ. Bearing in mind the tortuous history of attempts to establish the CCJ as Jamaica's final court of appeal, this approach could derail the Charter of Rights bill. That said, there is a case for the opposition party's approach. The Charter of Rights will create the opportunity for Jamaica's final court to consider the meaning and significance of the main human rights as identified by the Jamaican polity. It is coherent to suggest the judges in the best position to interpret those rights are persons with direct and immediate knowledge of the socio-economic context in which the rights are recognized.

### **International Law**

Under the heading of International Law, a number of current rule of law issues may be given brief consideration. As a starting point, we may assume that whenever Jamaica acts deliberately in violation of International Law, the State is disregarding the international rule of law. There is little reason to believe that Jamaica sets out deliberately to violate International Law, but from time to time the State is accused of doing so. The problem sometimes arises in the following fashion: X, a foreign State or a non-governmental organization, indicates that a certain course of action is required by International Law, and then observes that Jamaica has not followed the prescribed course of action; the accusing State or non-governmental organization then asserts that Jamaica is therefore in breach of International Law, and should correct its behavior. To be sure, if the premise on which X bases its accusation is correct – that a certain course of action is required by International Law – then Jamaica may well be in breach of International Law, and may be acting contrary to the rule of law. Significantly, however, on some occasions when the accusation is made, X fails to substantiate the premise of its argument, or simply assumes, without proof, that the certain conduct is required by International Law.

This situation is exemplified by the current discourse concerning the status of the death penalty in International Law. On one view, International Law, based largely on the language of Article 6 of the International Covenant on Civil and

Political Rights (the ICCPR) and on State practice, prohibits States from carrying out the death penalty in peacetime. This view has been supported in a number of resolutions of various human rights bodies and in resolutions of the General Assembly of the United Nations. In contrast, Jamaica maintains that Article 6 of the ICCPR expressly allows the death penalty, and that the practice of States also sanctions executions in some circumstances. In the circumstances, and bearing in mind that there is no clear evidence of State consensus on this point, it is difficult to conclude that Jamaica is acting in breach of the law – or acting contrary to the international rule of law – when it continues to support the death penalty. This is not to say that the death penalty is to be supported as a matter of policy; it is to suggest that International Law continues to distinguish between the *lex lata* (existing law) and the *lex ferenda* (proposals for changes in the law).

The point is also exemplified by other contentious issues in international policy discourse, including the questions of abortion and privacy rights. So, with respect to abortion, International Law is sometimes invoked, either to suggest that Jamaica needs to amend its domestic law in order to allow certain abortion rights or that the country needs to retain the law in order to meet the standards of the American Convention on Human Rights. These contentions are often based on unsubstantiated arguments about the International Law status of rules concerning abortion. Similarly, with respect to privacy rights, it is increasingly suggested that International Law now requires States, such as Jamaica, to recognize that individuals have basic human rights in respect of sexual orientation. It is argued that this right is founded upon the notion of personal liberty and is in keeping with individual dignity. In various societies, however, this question remains a matter of contention. In the circumstances, the international lawyer has a duty to assess the state of the law as it is. And in light of State practice and *opinio juris* on the subject, it is difficult to conclude that a general human right in respect of sexual orientation has passed into the *corpus* of the law. Both abortion and privacy rights raise important questions for the domestic polity, and until International Law speaks with clarity on either subject, the positivist should not reach conclusions unsupported by standard means of identifying International Law.

The epistemological question – how we identify rules of International Law – is therefore not always given sufficient attention by advocates of one or other position at the policy level. There is a tendency to say that the International Law on a subject requires a particular course of action, when what is meant perhaps is that International Law on a subject *should require* that course of action. Occasionally, this tendency is reinforced by the willingness to conflate recommendations of human rights bodies with decisions of international or national tribunals. In the case of Jamaica, for example, it is sometimes suggested or implied that recommendations of the Inter-American Commission on Human Rights make law for the country, and that if the State does not follow a recommendation of the Commission, it is in breach of International Law and the rule of law. The burden of the argument here is that this approach is not correct. Of course, if the recommendation of the Commission reflects a rule of customary international law, the recommendation may be binding; but the binding force comes from the underlying rule of customary international law, not from the recommendation itself. To argue otherwise is to pay insufficient attention to the meaning of the word ‘recommendation’.

Another related issue on the rule of law has arisen because Jamaica is yet to ratify the Rome Statute on the International Criminal Court. As is well known, the Rome Statute is now in force, and the International Criminal Court is proceeding with its work. It is also well known that the United States of America has refused to ratify the Rome Statute, and has sought to encourage the completion of bilateral treaties which would require States to refrain from carrying out certain provisions of the Rome Statute in respect of American military personnel and other persons working with the American military. It is suggested, from time to time, that the American approach – which may be loosely described as the Article 98 approach – is contrary to the terms of the Rome Statute, and contrary to the rule of law in international affairs. This question has a number of difficult dimensions but, for present purposes, it may be noted that the critics of the American position sometimes imply that the United States has a duty to ratify the Rome Statute. And, if this is so, then it would be that Jamaica also has a duty to ratify that treaty. Significantly, however, with the exception of commitments that amount to *jus cogens*, International Law does not require any State to enter into a treaty against its will. Thus, it is reasonable to suggest that, while it may be desirable for Jamaica to enter into the Rome Statute, there is no obligation to do so: in other words, Jamaica is not acting in breach of International Law by remaining outside the scheme contemplated for the International Criminal Court. Naturally, by staying outside the regime, Jamaica may be weakening its political credibility with some other States; this, though, is a question of policy, not one that suggests a failure to respect the rule of law.

A third set of issues under the current heading arises from the relationship between International Law and municipal law in Jamaica. Generally, the standard rule is that, as far as treaties are concerned, there is a dualist relationship between International Law and the laws of Jamaica. There is no shortage of judicial pronouncements on this question; so, for example, in a dictum of relevance to Jamaica, *Chung Chi Cheung v R*<sup>7</sup>, Lord Atkin noted:

It must always be remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our domestic law. There is no external power that imposes its rule upon our own code of substantive law or procedure.<sup>8</sup>

Recently, the Caribbean Court of Justice had occasion to consider specific dimensions of this rule in the case of *The Attorney General of Barbados et al v Jeffrey Joseph and Lennox Boyce*.<sup>9</sup> The distinguished judges of the court did not speak with one voice, but it is fair to suggest that there was general acceptance among the common lawyers on the Court that, for some purposes at least, International Law and municipal law operate on different planes. The upshot is that it remains good law that if Jamaica enters into a treaty, then, in the absence of special circumstances, that treaty does not become a part of Jamaican law unless and until it is incorporated into our local system in the form of legislation. Among other things,

<sup>7</sup>(1939) AC 160.

<sup>8</sup>On pp. 167–168.

<sup>9</sup>CCJ Appeal No CV2 of 2005 (Judgment delivered 8 November 2006)

this rule serves to respect the constitutional principle of the separation of powers: as pointed out in the *Joseph and Boyce Case*, given that the Executive executes treaties, it would be usurping the role of the Legislature if such treaties were automatically to become a part of domestic law.

In the present context, two rule of law issues may be noted. It will be recalled, in the first place, that the previous Jamaican Government was embroiled in a matter described as 'the Trafigura affair'.<sup>10</sup> One aspect of the Trafigura affair involved the payment of a sum of money by a Dutch company, Trafigura Beheer, to the People's National Party. It is reported that under Dutch law, contributions by a Dutch company to political parties are in some circumstances regarded as illegal, and so it is further reported that the Dutch authorities sought permission from the previous Jamaican Government to come to Jamaica to investigate the circumstances concerning the payment of money by Trafigura. The legal basis for the Dutch request was that Jamaica and the Netherlands are both parties to the United Nations Convention on Transnational Organized Crime, which contemplates investigations by agents of one country on the territory of another for certain crimes. Now, without reaching any conclusions about the responsibility of the former Jamaican Government in the Trafigura matter, it is clear that, at the international level Jamaica had a duty to obey the terms of the Convention on Transnational Organized Crime. But was there an obligation on the Jamaican Government under domestic law? Given that International Law is not automatically a part of Jamaican law, the answer to this question depends on whether or not there was any legislation in Jamaica giving effect to the Convention on Transnational Organized Crime in Jamaica. As there was no such legislation or no relevant order arising under legislation, the Government would have acted contrary to the rule of law if it had allowed the Dutch authorities to come into the country; as was subsequently to happen, the current government, after coming to power, took the necessary legislative steps to give effect to Jamaica's international commitments vis-à-vis the Netherlands under the Convention on Transnational Organized Crime. In the end, the rule of law was respected.

The second, and more difficult, rule of law question here concerns the appropriateness of treaty ratification without the passage of requisite legislation. On the one hand, where Jamaica ratifies a treaty, then persons within the jurisdiction may justifiably expect that the State will bring the terms of the treaty into domestic law. For, otherwise, the ratification of the treaty could be regarded as a sham, an attempt to present one face to the international community, and a different one to the individuals within the country. This charge is particularly important in the context of human rights, where the intention of the State in ratifying a treaty may reasonably be taken as a sign that the State wishes its citizens to have the human rights in question. On the other hand, as noted above, the idea that persons within Jamaica must, by operation of law, automatically have rights set out in treaties executed by Jamaica is contrary to the constitutional principle of separation of

<sup>10</sup>See, e.g., "Major Controversy over Trafigura scandal", *The Jamaica Gleaner*, October 11, 2006; "Mum on Trafigura-PNP Officials may not speak to Dutch Investigators." *ibid.*, March 3, 2008; "Trafigura-The Attorney General's Chambers," letter from the Acting Solicitor General of Jamaica; Patrick Foster Q.C. to the Editor of the *Jamaica Gleaner*, *ibid.*, November 25, 2007.

powers. Moreover, it must be borne in mind that in some circumstances small countries such as Jamaica feel pressured to enter into certain treaties, even if these countries do not have the financial and other means to satisfy their treaty commitments on the domestic plane. In short, although the ratification of a treaty prompts the expectation that the State will act in accordance with its commitments, and will therefore respect the international rule of law, there are mitigating considerations that may well support a different conclusion.

### **Concluding remarks**

Several recent developments in Jamaica have touched and concerned the rule of law. Some of these developments arise directly from the General Election of 2007, the implications of which are still being addressed both in court and elsewhere. Among other things, the country has had to contend with the issue of what should happen in the case of tied elections, and the question of dual nationality has prompted discussions about the underlying assumptions of our democratic order. Still at the domestic level, there is outstanding business concerning the Charter of Rights; in the interest of human rights promotion and protection, it is to be hoped that the Charter will eventually come into port, regardless of which government does the final steering. Finally, although International Law issues have not had the same degree of prominence as domestic law questions, some International Law issues continue to require careful attention. They raise important questions of principle, which are often ignored by lawyers and policy makers at the domestic level.

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### **Note on contributor**

Professor Stephen Vasciannie is Principal of the Norman Manley Law School and a Member of the UN International Law Commission. He holds a DPhil from the University of Oxford, an LLM from the University of Cambridge and a BSc from the University of the West Indies.